

Nintendo Creators Purgatory: Why YouTubers should think twice before registering for the Nintendo Creators Program

Yvette Ann Walker

University of Southern California

Gould School of Law

Abstract

Recently, Nintendo launched the Nintendo Creators Program, designed to share profits generated from YouTube advertising revenue with YouTube creators using copyrighted Nintendo content. On the one hand, the program is an insightful response to the problems many content rights holders face in policing YouTube for copyright infringement. By having YouTubers essentially report their own infringement, rights holders like Nintendo can save on the enforcement costs generated under a system that requires holders to scour YouTube, identify infringing content and reporting such content in a take down notice. On the other hand, the Creators Program has several pitfalls for creators including exposure to censorship, bureaucracy and content use and abuse.

Keywords

Nintendo; copyright infringement; fair use; YouTube; game reviews; gameplay; licensing

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Nintendo Creators Program

Introduction

Recently, Nintendo rolled out its new Nintendo Creators Program ("NCP") which allows YouTube creators to receive a share of advertising proceeds for registered videos that include Nintendo copyrighted material. At first glance, the NCP seems like an olive branch, with Nintendo offering a share of profits they maintain rightfully belong to them. However, the program has had a controversial reception. According to Nintendo, the NCP has reached a considerable level of applications, causing a delay in the approval process that Nintendo attributes to overwhelming excitement by applicants (Nintendo Announcements, 2015). While the NCP is the first program of its kind, the structure may easily and quickly be instituted by other game developers and eventually rights holders in other industries like music, literature, theatre and film. However, several critiques have cropped up challenging the NCP as unethical, greedy and suppressive. This commentary seeks to explain the mechanics of the NCP, its legal landscape, and some of its critiques predominately in the hopes of educating interested readers about the legal structure of the NCP and some concerns that applicants should weigh.

The Nintendo Creators Program

The NCP seeks to provide creators with a share of advertising revenue received by Nintendo for YouTube videos posted by those creators containing Nintendo copyrighted content. All YouTube creators, regardless of subscribers, views or any other marker of success or influence are entitled to apply to the NCP. Creators can either register individual videos or their entire channel and will earn sixty percent of advertising revenue for videos and seventy percent for channels. According to Nintendo, the NCP will give creators a share of advertising revenue which Nintendo is entitled to under the YouTube Terms of Service (Nintendo Creators Program User Guide, 2015).

By rule of law and by YouTube policy, Nintendo is likely right that it is entitled to profit from videos using its copyrighted content. Nintendo states that, "in the past, advertising proceeds that could be received for videos that included Nintendo-copyrighted content (such as gameplay videos) went to Nintendo, according to YouTube rules. Now, through this service, Nintendo will send you a share of these advertising proceeds for any YouTube videos or channels containing Nintendo-copyrighted content that you register" (About the Nintendo Creators Program, 2015). However, while Nintendo is entitled to the advertising revenue of videos including their copyrighted content, if not for the NCP, that revenue goes to creators unless Nintendo intervenes by reporting the infringement to YouTube and pursuing legal remedies. This would

require resources such as time spent policing YouTube for infringement and legal fees to implement remedies. Therefore, functionally, the NCP is actually a system through which creators pay a thirty to forty percent license fee for the right to use Nintendo copyrighted works in their videos rather than receive a sixty to seventy percent share for registering. This allows the NCP to serve as a burden shifting process where infringers report their own infringement and are paid to do so.

Further, registration in the NCP subjects creators to new rules and restrictions (Nintendo Creators Program End User License Agreement, 2015). For example, videos in the program cannot feature any other copyrighted works or any content from games not listed as compatible with the NCP. This means that creators choosing to enrol in the NCP will be limited to working with the games Nintendo approves for the program and their content will be subject to Nintendo's approval. For creators, the NCP can lead to limited source material. If not for the NCP, a creator could use any material she wants in a video. Once a member, a creator can only use games covered in the NCP. So, for example, a creator wanting to compare games, could only register videos in which she compares Nintendo games included in the NCP. Further, creators wanting to use music in their registered videos or channels can only use those songs listed in the YouTube Audio Library, unless perhaps they use songs that are not copyrighted (To our YouTube Creators, 2015).

Further, videos must be reviewed by Nintendo. This could subject creators to censorship by Nintendo as videos might not be approved for any number of reasons. However, Nintendo maintains that "as long as a video or channel complies with the Terms of Service, it will not be denied registration on the basis of opinions or views" (About the Nintendo Creators Program, 2015). This should provide some comfort for creators concerned over early criticisms that the NCP would deny videos based on their critical nature. However, these terms and conditions prohibit any "defamatory" and "obscene" conduct (Nintendo Creators Program End User License Agreement, 2015). This means that, while the possible censorship of critical content may be abated for some, worries about censorship of language or behaviour have not been addressed.

Perhaps most egregiously, NCP members grant Nintendo a "perpetual, worldwide...royalty free" license to use and modify any of their registered content "for the purposes of promoting, advertising and marketing the Nintendo Creators Program and Nintendo hardware, software, products and services" (Nintendo Creators Program End User License Agreement, 2015). This broad provision should give any creator considering registration pause. As a business transaction, it seems fair, maybe even generous. Nintendo is essentially purchasing a license to use a creator's work and, in turn, the creator gets a license to use Nintendo's work as well as a percentage of the advertising revenue. However, further consideration presents ways that this might impact a

creator's brand and freedom. This license grant exposes content to use as advertising for a product that a creator does not necessarily support or in a way that changes the message or style of the content.

Copyright Law

Nintendo has copyrighted its content, giving the company the exclusive right to reproduce such content, or to license others to make such reproductions (title 17, U.S. Code 106). However, that right is limited by the doctrine of fair use which many creators cite when using copyrighted works on YouTube. Fair use entitles a person to reproduce copyrighted works without violating copyright protection for a limited number of purposes such as "criticism, comment, news, reporting, teaching, scholarship or research" (title 17, U.S. Code 107). This exemption is a key provision of Copyright Law for much of the content posted to YouTube. These exceptions suggest that a creator does not infringe on a copyright by using portions of games in game reviews, and even some gameplay videos¹, as they can function as critiques or teaching tools for players who get stuck and turn to YouTube for assistance. A claim of fair use will be evaluated on a number of factors including the nature of the use "including whether such use is of a commercial nature" and the effect "upon the potential market for or value of the copyrighted work" (title 17, U.S. Code 107). In this case, these two factors can work in tension with one another. A creator may argue that her gameplay video is not an infringement under the doctrine of fair use but that argument may be in jeopardy if she receives any advertising revenue because her use has become a commercial venture. It should be noted that, unlike some other types of content (such as songs reproduced on YouTube), the market for a videogame is hardly in peril due to gameplay videos. In fact, the market may actually be stimulated by creators spreading the word about games. Because the applicability of the doctrine of fair use is decided on a case by case basis, it is difficult to determine whether a video will be entitled to its protection. In this case however, it is likely that the doctrine does not protect creators that are making advertising, or other sorts of revenue, using copyrighted material.

Nintendo is well within its rights in formulating the NCP. In fact, it's an ingenious response to a problem several rights holders are facing. YouTube requires rights holders who believe that a video infringes to submit a copyright take down notice. This means that YouTube shifts the burden to police the site for copyright violations to the rights holders. This can be an onerous undertaking given the vastness and flexibility of the YouTube library. The NCP shifts that burden from the rights holder, Nintendo, to the infringers, the creators. Rather than Nintendo vigilantly scouring YouTube for infringing content, Nintendo has created a system through which creators report their own

¹ Gameplay videos are videos in which creators film themselves playing a particular game. Commentary on such videos may serve as a critique or as education for other players.

infringement and pay a thirty to forty percent license fee for the right to use copyrighted works.² However, there are a number of insightful critiques of the NCP.

Criticism

Despite the NCP's considerable number of applications, vocal critics have emerged from the YouTube community. These critical reactions are layered, encompassing both economic and creative concerns (George 2015 & Hernandez 2015). For example, popular creator The Cynical Brit exposed the possible hidden economic costs of signing up for the NCP such as PayPal transaction costs and currency conversion fees (The Cynical Brit, 2015). Juxtaposing the NCP with Mojang's more *laissez faire* approach to Minecraft's YouTube popularity, influential YouTube creator Felix Kjellberg (aka PewDiePie) asserted that the NCP highlights a lack of appreciation for and basic understanding of the sales driven by the exposure products glean from features on YouTube (PewDiePie, 2015). Underpinning the widespread disdain for the NCP is the appearance that Nintendo lacks any respect for the work of creators and the precarious legal, economic and cultural relationship between YouTube content creators and corporate rights holders. Nintendo's blunder can serve as a lesson for other gaming companies, and more broadly, consumer facing companies that are trying to balance their concern for revenue protection and market stimulation as they contend with modern day infringement.

Among the more economically based criticisms of the NCP, accusations of censorship stand out (George, 2015 & Hernandez, 2015). There are two NCP rules that function to suppress the unadulterated creation of content. First, creators cannot use any content from third parties (Nintendo Creators Program End User License Agreement, 2015). This restriction makes complete sense; Nintendo does not want to have to further distribute profits or expose itself to a law suit from third party rights holders. However, this precludes the use of music and art, severely diminishing creator choice. Further, this restricts the inclusion of content from other games that a creator may wish to use in comparison to the registered Nintendo content. The NCP also requires creators to allow Nintendo to review videos before they are posted. Nintendo asserts that all video which comply with the NCP terms and conditions will be approved (Nintendo Creators Program User Guide, 2015). These terms and conditions include a prohibition on any "defamatory" and "obscene" conduct (Nintendo Creators Program End User License Agreement, 2015) which may stifle particular creators. Finally, the review process burdens creators by precluding their releasing content as soon as it is ready, which could negatively impact viewership.

² The fee affects all creators, though those that are more successful will have an easier time parting with a percentage of their revenue than others.

Conclusion

Creators should think twice before registering under the NCP. While it is an insightful attempt to approach the rampant infringement problems of YouTube, the NCP has some serious pitfalls including the license demanded from creators by Nintendo and the review process. Ultimately, the decision to enrol in the NCP is a cost benefit analysis for each individual creator. Creators will have to balance their gain of security stemming from their license to use Nintendo content, against their loss of autonomy at the hands of Nintendo's limitations on their source material and expressive freedom. Underlying this analysis for each creator will be a basic evaluation of what motivates their content, as commercial success may become at odds with creative expression.

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